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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP,

Appellees

JURISDICTIONAL STATEMENT

The statutory provision believed to sustain the jurisdiction is Section 237(a), (b) and (c) of the Judicial Code as Amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344(a), (b) and (c), 861(a) and 861(b).

The statutes of the State of Missouri the validity of which is involved include the Missouri Partnership Administration Statute, Article 3, Chapter 1, Revised Statutes of Missouri, 1939, Section 948 R. S., and Sections 2458, 2459, 2460 and 2461 R. S. Mo. 1939.

The statutes of the United States the validity of which is involved include Revised Statutes 1979, 1980 and 1981 (Sec-

tions 43, 47 and 48, Title 8, U. S. C.), and Section 8 of the Act of Congress of March 6, 1820 (3 U. S. Stat. 545, Chapter 22), admitting Missouri to the Union.

The judgment sought to be reviewed was rendered on February 11, 1946, and the Motion for Rehearing and to Transfer to Court *en banc*, duly filed, was overruled on April 8, 1946.

This appeal is allowed on this — day of June, 1946.

How Federal Questions Were Raised

The Federal Questions were raised in the pleadings at the outset, and continued in the case throughout. Said questions were preserved in the record proper and by exceptions in the Bill of Exceptions, Assignments of Error in the State Supreme Court, Motion for Rehearing and Transfer to the Supreme Court of Missouri, *en Banc*, and Assignments of Error in this Court.

As to Federal Questions resulting from rulings of the courts which appellants could not anticipate, such questions have been raised by Assignments of Error in the State Supreme Court, Motion for Rehearing and to Transfer to Court *en Banc*, and Assignments of Error in this Court.

The opinion of the Supreme Court of Missouri states (193 S. W. 2d, l. c. 590):

> "We will briefly set forth the general nature of the petition but deem it unnecessary to make a complete summary."

This necessitates a longer jurisdictional statement than ordinarily necessary.

(Figures in brackets refer to pages of the Record)

Mrs. Moffett began an action, in the circuit court of Jackson County, Missouri, on August 22, 1941, for damages

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based on property loss resulting from overt acts pursuant to a conspiracy violating her civil rights, by filing a 10 page petition and suing out process thereon. Appellees' attacks thereon resulted in the filing of a 39 page first amended petition (4-43) adding Mrs. Moffett as Executrix as a party plaintiff and two defendants, on which said petition six unsuccessful attacks, including the ground of misjoinder of parties plaintiff, were made (44-51) before assignment judge Buzard (47). A succeeding assignment judge erroneously made an order purporting generally to sustain three not legally pending demurrers and one non-pending demurrer to the same first amended petition (60-61). This caused the filing of a 73 page third amended petition (62-135) specifying the provisions of the United States Constitution, Laws and a Treaty on which the action was based. Another assignment judge erroneously made an order generally sustaining four pending demurrers to said pleading (152-153). This caused the filing of a 169 page (154-323) fifth amended petition, again specifying said provisions of the United States Constitution, Laws and Treaty. Thirty pages of exhibits were filed therewith (325-354). Another assignment judge, on the sole ground of misjoinder of parties plaintiff, erroneously sustained separate demurrers thereto, and made a finding "upon the record and from suggestions of counsel for said defendants now appearing, the court finds that a third petition of the plaintiffs has been found insufficient upon said ground" (401), and erroneously assigned said cause to his own division (424). Thereupon, without notice or hearing, said action was dismissed by the court and appellants' right to recover or to institute any further action forfeited, and a statutory penalty in favor of appellees adjudged against appellants, the entry reciting that three petitions had been found insufficient on demurrer (424-425) on the ground of misjoinder of parties plaintiff.

Appellants appealed on December 30, 1944, to the Supreme Court of Missouri. Division 1 of that court affirmed the judgment on February 11, 1946, and overruled a motion for rehearing or to transfer to Court *en banc* on April 8, 1946. In addition to affirming on the inadequate and untenable ground of misjoinder of parties plaintiff, the state supreme court held that, notwithstanding the law as to demurrers was repealed (Laws Missouri 1943, p. 361, Sec. 17), which repeal became effective four hours after the trial court rendered said judgment, the separate demurrers could have been sustained on the ground of misjoinder of causes of action (193 S. W. 2d, l. c. 591 (2, 3), specifying a libelous overt act, pursuant to the conspiracy, affecting appellants' federal rights (193 S. W. 2d, l. c. 590, bottom second column), as an independent cause of action (contrary to the decision in *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 328, 329), and the ground that the petition failed to state a cause of action (193 S. W. 2d, l. s. 591 (2, 3), notwithstanding the law authorized recovery under the Federal Civil Rights Acts (R. S. 1979, 1980 and 1981).

All the Federal Questions involved were decided against appellants.

Said Division 1 of the Missouri Supreme Court is not the highest court in Missouri. Appellants sought by said motion to transfer the case to Court En Banc, which is the highest state court (*Gorman* v. *Washington University*, 316 U. S. 98; *Osment* v. *Pitcairn*, 317 U. S. 587). Division 1 did not apply the law as declared by the state Supreme Court En Banc, although bound so to do (*State ex rel.* v. *Reynolds*, 278 Mo. 554, l.c. 557-558; *State ex rel. Nevins* v. *Hughes*, 347 Mo. 968, l.c. 976), on many federal questions, including the question of the *res judicata* effect of its own judgment in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, in violation of the XIVth Amendment.

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A copy of the opinion in said companion case is attached as Exhibit "B".

A copy of the opinion in this case is attached as Exhibit "A".

Among the overt acts committed by appellees were those resulting in a multitude of void court proceedings and fictitious suits for $2,539,366.80 (268), intentionally kept pending since 1930 for the purpose of injuring appellants by depriving them of the rights secured to them by the Acts of Congress known as the Civil Rights Acts, R. S. 1979, 1980 and 1981 (Sections 43, 47 and 48 Title 8 U. S. C.), Sections 51 and 52 Title 18 U. S. C., the XIIIth and XIVth Amendments to the Constitution, Section 10 of Article I of the Constitution prohibiting bills of pains and penalties, and Article III of the Treaty with France of April 30, 1803 (8 Stat. at L. 200, 202). The validity of Section 8 of the Act of Congress of March 6, 1820 (3 U. S. Stat. 545, Chap. 22), admitting Missouri to the Union and known as the Missouri Compromise, and of said Acts of Congress known as the Civil Rights Acts, is here involved.

Among the statutes of the State of Missouri the validity of which, on the ground of being repugnant to said provisions of the Constitution and Article III of said Treaty, is involved is the Missouri partnership administration statute (Art. III Chap. 1 R. S. Mo. 1939 (R. S. A.), and especially Sections 86, 87 and 88. Section 86, in substance, provides that, on failure of a surviving partner for 30 days after grant of letters testamentary on deceased partner's estate to file bond "the executor or administrator of the deceased partner shall give bond, in addition to the bond given by him as executor or administrator, in a sum at least double the value of the whole copartnership estate." Section 87 provides that every surviving partner, when such executor gives such bond, "shall surrender to him, on demand, all the property of such partnership, including

their books and papers, and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust." Section 88 provides that every surviving partner failing to comply with said sections may be cited therefor "before the proper court," and then provides "unless he comply with such provision, or show sufficient cause for his omission, the court may commit him to the common jail of the county, there to remain until he consent to comply, or is discharged by due course of law."

The validity of Section 948 R. S. Mo. is involved on the ground of repugnancy to the attainder provision of Section 10 of Article 1 and said provisions of the Constitution. It provides that when a third petition in a cause is adjudged insufficient on demurrer, that then "the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered."

The validity of Sections 2458, 2459, 2460 and 2461 R. S. Mo. 1939 is involved on the ground of repugnancy to the "equal protection of the laws" provision of the Constitution. They purported to authorize the selection of a "Special judge of probate" by five attorneys, contrary to the provisions of Section 34 of Article VI of the state constitution vesting the judicial power in courts, including a probate court "in every county" which shall "consist of one judge, who shall be elected" by the people, and in case of a vacancy between elections the governor should fill the vacancy by appointment. The Missouri constitution contains no "equal protection of the laws" provision, and the validity of such statutes as applied, in denying appellants the protection of said state constitutional provisions was drawn in question by appellants because of conflict with the equal protection provision of the XIVth Amendment

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to the Federal Constitution (*Pierre* v. *Louisiana*, 306 U. S. 354; *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780-785; *Broad River P. Co.* v. *State ex rel. South Carolina*, 281 U. S. 537, l.c. 540).

The failure to give effect to the judgment of the United States Commissioner of Internal Revenue, whose judgment established that there was no basis for the judgment rendered by the district court of Harper County, Kansas, is here involved. (*United States* v. *Kaufman*, 96 U. S., l. c. 570-571; *M. K. & T.* v. *Elliott*, 184 U. S. 530). Said judgment is as binding as the judgment of a federal court, and such failure raises a Federal Question.

A. The Federal Questions Involved Herein Are Substantial

Questions involved in this case are *per se* and inherently federal. Appellees and others entered into an unlawful conspiracy to misuse the power of two states (285, 287) to deprive appellants of their rights secured to them by each and all of the aforementioned provisions of the United States Constitution, Laws and Treaty. Among the conspirators exercising such power was a Kansas state district judge (197, 208, 223-224) and Commerce Trust Company as purported Missouri executor of a deceased partner's estate, and purported Missouri administrators of partnership estates dissolved by the death of the deceased partner, the interests of which partnership estates were in conflict with the deceased partner's estate. Pursuant to said conspiracy appellees and others committed the overt acts alleged (195-198, 285-288, 223-224, 242-246).

The truth of the facts (154-353) was admitted by the demurrers (*Lawson* v. *Higgins*, 350 Mo. 1066). In *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 324, it is said: "The facts alleged are admitted by the demurrer, and, in determining

their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court."

In briefs (299-308) in support of their demurrers to the third amended petition, appellees stated: "The petition charges that by reason of false and perjured testimony and the corruption of the trial judge, plaintiff was deprived of her property in violation of Section 1 of the 14th Amendment to the Constitution of the United States. • • • The petition further alleges that by reason of the conspiracy and the corruption of the court, plaintiff was denied the rights secured to her by the Constitution of the United States 'and especially by the said provisions of the 14th Amendment to the Constitution of the United States, and by the provisions of Section 51 and 52 of Title 18 • • • and that said defendants, by reason of the injury thus caused plaintiff, became liable to said plaintiff under and by virtue of Section 43, Title 8.' " Said admission was of the same facts re-alleged in the fifth amended petition. The fifth amended petition, to which the last demurrers were directed, included an allegation setting forth the foregoing admission (299). Said admissions were overlooked by the state supreme court, when it held that a judgment so rendered did not deny appellants due process (193 S. W. 2d, l. c. 592, last 2 paragraphs).

In *In re Moffett Brothers Partnership Estate*, 345 Mo. l. c. 750, it was decided that Commerce Trust Company unlawfully prosecuted a claim as executor of the estate of the deceased partner John Moffett against itself as administrator of the partnership estate of Moffett Brothers before said Kansas judge. The opinion, discussing the acts of appellee Howard as claimant for a fee, declared that: "And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John

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Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a lawsuit on the same claim of indebtedness, as here, and claimant representing both of them. In a supplemental brief on behalf of the Commerce Trust Company, filed by attorneys * * * There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate in the partition-accounting suit." Said facts rendered said judgment void (*State ex rel. Miller's Admr.* v. *Bidlingmaier*, 26 Mo. l. c. 486; *State ex rel. Mueller's Admr.* v. *Reinhardt*, 31 Mo. 95).

The fifth amended petition also alleged that said Kansas judge intentionally made a false order of revivor (184-213), and in doing so acted in concert (223, 214) with said appellees, evidently laboring under the delusion that relief could not be had from a judgment so obtained (*Horner* v. *Shinstock*, 80 Kan. 136), wherein he appears to be counsel; and that said judge had actual knowledge of the falsity of Commerce Trust Company's Exhibit No. 8 offered in evidence on said trial by Commerce Trust Company through appellee Howard as its attorney for the John Moffett estate against Commerce Trust Company as administrator of Moffett Brothers partnership estate. The Missouri Supreme Court, in its opinion herein, erroneously held that such conduct constituted due process (193 S. W. 2d, l. c. 592).

This unanticipated error was called to the attention of the Supreme Court of Missouri at the first opportunity, in appellants' motion for rehearing.

As the action in the state court was based on appellants' right to recover on Sections 1979, 1980 and 1981 U. S. R. S. (Secs. 43, 47 and 48 Title 8 U. S. C.), supplementing the constitutional provisions and Treaty, the question presented to the state court was necessarily a question of federal law within the rule stated in *First National Bank* v. *Anderson*, 269 U. S. 341, l. c. 346: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. Mitchell *v.* Clark, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; Boyd *v.* Nebraska, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375; Covington & L. Turnp. Co. *v.* Sandford, 164 U. S. 578, 595, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; Carther *v.* Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687. The principle is general, and is a necessary element of this court's power to review judgments of state courts in cases involving the application and enforcement of Federal laws. Davis *v.* Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 145, 44 Sup. Ct. Rep. 13. • • • In cases coming from state courts this court's power and concern are especially directed to rulings made or refused on Federal questions. Murdock *v.* Memphis, 20 Wall. 590, 638, 22 L. ed. 429, 445, Bi-Metallic Invest Co. *v.* State Bd., 239 U. S. 441, 444, 60 L. ed. 372 374, 36 Sup. Ct. Rep. 141. With the objections just considered out of the way, it suffices to say this court's jurisdiction on the writ of error has full support in Dahnke-Walker Mill Co. *v.* Bondurant, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106. The motion to dismiss is accordingly overruled"

Denial of the rights guaranteed by Section 1 of the XIVth Amendment and R. S. 1979, 1980 and 1981, same being Sections 43, 47 and 48 Title 8 U. S. C. (225, 287-288), authorized appellants to institute the action at law in the state court to recover damages for the resulting loss (*Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487). Appellants could recover such damages under the decisions of this and other courts. See *Picking et al.* v. *Pennsylvania Railroad Co. et al.*, 151. Fed. (2d) 240 (C. C. A. 3), which holds that a Railroad Company and other persons not state officers, by adopting and becoming parties to the conspiracy to which state officers, including a judicial officer, were parties, were liable to a husband and wife as plaintiffs in the same case for the loss resulting, under said Civil Rights Acts, from unlawful overt acts incident to suich conspiracy.

The Federal questions here presented, as to the right to recover damages for violation of constitutional rights, were decided in favor of appellants in *Bell et al.* v. *Hood et al.*, 90 L. ed. 758, 66 S. Ct. *773*, where it is said, l.c. 761-762: "The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution. (Wiley *v.* Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. Ct. 17 and Swafford *v.* Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 S. Ct. 783. See also Brickhouse *v.* Brooks (CC) 165 Fed. 534, 543, in which a similar suit was held to be within the jurisdiction of the Federal court).

And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safe-guarded by the Constitution (Philadelphia Co. *v.* Stimson, 223 U. S. 605, 56 L. ed. 570, 32 S. Ct. 340. Hays *v.* Seattle, 251 U. S. 233, 64 L. ed. 243, 40 S. Ct. 125; Pennoyer *v.* McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699; City R. Co. *v.* Citizens' R. Co. 166 U. S. 557, 41 L. ed. 114, 17 S. Ct. 653; Mitchell *v.* Dakota Cent. Teleph. Co., 246 U. S. 396, 407, 62 L. ed. 793, 799, 38 S. Ct. 362) and to restrain individual state officers from doing what the 14th Amentment forbids the state to do. (Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; see also *Ex parte* Virginia, 100 U. S. 339, 346, 347, 25 L. ed. 676, 679, 680). Moreover, where federally protected rights have been invaded, it has been the rule from the beginnig that courts will be alert to adjust their remedies so as to grant the necessarry relief (Marbury *v.* Madison, 1 Cranch (U. S.) 137, 162, 163, 2 L. ed. 60, 68, 69; Texas & N. O. R. Co. *v.* Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 569, 570, 74 L. ed. 1034, 1045, 50 S. Ct. 427). And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done See e.g. Dooley *v.* United States, 182 U. S. 222, and cases cited and discussed at 228-230, 45 L. ed. 1074, 1080, 1081, 21 S. Ct. 762; Jackson County *v.* United States, 208 U. S. 343, 349, 350, 84 L. ed. 313, 316, 317, 60 S. Ct. 285). Whether the petitioners are entitled to recover depends upon an interpretation of 28 U. S. C. A. Sec. 41 (1), 7 F. C. A. title 28, Sec. 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United

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States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction."

There this Court thus gave effect to the same principle applied in *Weeks* v. *United States*, 232 U. S. 383, where it was held that if the Government could be permitted to take advantage of its own violation of the XIVth Amendment to the Constitution, that the constitutional command "is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." (1. c. 393) And so, if the admitted violations of the XIVth Amendment could be held not to authorize recovery herein, then the prohibitions thereof to the states as to privileges and immunities, due process and equal protection of the laws, are also of no value and might as well be stricken from the Constitution. The admitted acts of appellees, pursuant to the unlawful conspiracy, in violation of rights secured by the Federal Constitution "should find no sanction in the judgments of the courts, which are charged at all times with support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (*Ibid.* 1. c. 392).

Said rights are not merely rights created by state laws protected by the Federal Constitution, though the petition does assert some rights of that character. The rights created by said Civil Rights Acts and by the Constitution and Treaty are enforceable in the state courts, for "The laws of the United States are laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are. * * Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction." (*Claflin* v. *Houseman*, 93 U. S. 1. c. 136). The Missouri

court in *Wells* v. *Davis*. 303 Mo. 388, quoted the above with approval, and also quoted and applied the Federal law, as applied by a Pennsylvania court where it said of a Federal statute creating a right or cause of action:" • since the Supreme Court of the United States has decided that this statute must be treated by state courts, in each instance, as though an act of their own legislature, for all practical purposes it is a Pennsylvania statute." (1. c. 403). The court then pointed out that the fact that the Pennsylvania state statutes purporting to deal with such Federal questions, both as to rights *and remedies*, had no application, saying: "As to this class of persons it *pro tanto* repealed the State Statutes. Such State statutes became as ineffective, both as to rights and *remedies*, as they would have been had they been specifically repealed by the State." (1. c. 404-405).

This Court in *Wiley* v. *Sinkler*, 179 U. S. 58, and *Swafford* v. *Templeton*, 185 U. S. 487, l.c. 492, has held that as to rights of action for damages caused by violation of rights created by the Civil War Amendments, the State and Federal courts have concurrent jurisdiction, and both were approved in *Bell et al.* v. *Hood et al., supra.* In *Swafford* v. *Templeton, supra,* this Court pointed out the jurisdictional distinction between "controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in their essence Federal, and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character." (l.c. 494.)

This consideration as to the questions here involved brings this case within the class of controversies concern-

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ing rights created by the Constitution and laws of the United States, rather than those not created by the Constitution or laws of the United States but which may or may not involve a Federal question, as outlined in *Swafford* v. *Templeton, supra.*

Federal questions which are *per se* and inherently Federal are questions, with reference to Federal jurisdiction, which are always "substantial" in a State or Federal court. *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, involved a review of a judgment of the Territorial Court of Hawaii. An Act of Congress gave this Court the same jurisdiction to review that territorial court judgment as it is given to review the State judgment herein by Section 344, Title 28 U. S. C. There this Court stated the rule which applies in this case, thus, l.c. 311: "The power, however, to dismiss, because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is *per se* and inherently Federal. Swafford *v.* Templeton, 185 U. S. 487, 493."

That principle was applied in *Bell et al.* v. *Hood et al.*, 90 L. Ed. 758, following and applying *Swafford* v. *Templeton, supra,* holding that because of the violation of the guaranties of the Fourth and Fifth Amendments by Government officers breaking into plaintiff's home and depriving them of their liberty and subjecting them to unlawful arrest and unreasonable search and seizures in violation of the Constitution, constituted a Federal question giving the Court jurisdiction.

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. (2d) 240 (C. C. A. 3), the same principle was applied in holding that State officers and others who, pursuant to a conspiracy, misused the power of the two States to the injury of plaintiffs there, were liable under R. S. 1979, Sec. 43, Title 8

U. S. C. And, following the principle outlined in *Culp* v. *United States*, 131 F. (2d) 93, cited in a concurring opinion in *Screws* v. *United States*, 325 U. S. 91, the Court of Appeals held that the trial court erred in holding that the "inept" pleading there involved did not state a cause of action, and on the contrary decided that the Constitution and the Civil Rights Acts *created a cause of action* for deprivation of constitutional rights which the court was bound to enforce.

In *Neal* v. *Delaware*, 103 U. S. 307, this Court held that if a state court deprived any person within its jurisdiction of his civil rights that the error will be corrected in a superior court of the State, and if not "ultimately in this Court on review."

In *Kentucky* v. *Powers*, 201 U. S. 1, l.c. 31, it was decided that this Court had jurisdiction, on appellate review, to protect any right granted or secured by the Constitution or Laws of the United States, and denied by a state court.

R. S. 1979 has on many occasions been held valid by the courts. (*Smith* v. *Allwright*, 321 U. S. 649; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268; *Guinn* v. *United States*, 238 U. S. 347; *Brickhouse* v. *Brooks*, 165 Fed. 534 (cited with approval in *Bell et al.* v. *Hood et al.*); *Myers* v. *Anderson*, 238 U. S. 368; *West* v. *Bliley et al.*, 33 F. (2d) 177, 42 F. (2d) 103; *Anderson* v. *Meyers*, 182 Fed. 223, l.c. 227; *Wayne* v. *Venable*, 260 Fed. 64; *Wadleigh* v. *Newall*, 136 Fed. 941.)

The demurrers admitting the facts which authorized appellants to recover under the Civil Rights Acts, R. S. 1979, 1980 and 1981 (Secs. 43, 47 and 48 Title 8 U. S. C.), questioned the validity of said Acts of Congress by claiming that appellants were not entitled to recover under said statutes. The Missouri court, by sustaining said demurrers, has held said Acts of Congress invalid. (*United States* v. *Sutton*, 215 U. S. 291, l.c. 294).

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Plaintiff, in two capacities, was held by this Court to be entitled to recover damages for violation of the constitutional rights involved in that case (*Bell et al.* v. *Hood et al.*, 90 Law Ed. 758). And so appellant herein, in two capacities, is entitled to recover, since it is alleged and admitted that appellants' federal rights were violated, to her damage, in both capacities.

This Court, even in an original proceeding, recently permitted the same person to sue in the same case in an individual and representative capacity (*Georgia* v. *Pennsylvania R. Co. et al.*, 324 U. S. 439, 89 L. Ed. 1051). There is no legal reason to prevent appellants herein from enforcing federal rights in the state court in such capacities.

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3) the Court of Appeals held that a husband and wife, as joint plaintiffs, were entitled to recover, in a case on all fours with that at bar, for violation of the rights secured by the Constitution and the same Civil Rights Acts. Furthermore, the statutes of the State of Missouri, Sections 856, 857 and 858 R. S. Mo. 1939 (R. S. A.) authorized the maintenance of actions in the courts of that State by any person or persons who could maintain the same in the federal courts (*Shaw* v. *Railroad*, 314 Mo. 123, l.c. 130; *Bright* v. *Wheelock*, 323 Mo. 840; *Wells* v. *Davis*, 303 Mo. 388; and Kansas courts: *Hotchkiss* v. *Ogle*, 153 Kan. 156, l.c. 162; *Ravenscraft* v. *Pratt*, 22 Kn. 20, 167. The denial of that right to appellant here by the supreme court of the state denied the rights secured by the XIVth Amendment (*Lawrence* v. *State Tax Coms'n.*, 286 U. S. 276).

In *Art Metal Works* v. *Abraham and Strauss*, 70 Fed. (2d) 639, the opinion of a three judge court was written by a judge later convicted of corruption (*United States* v. *Manton*, 107 Fed. (2d) 834). The same court, five years after, set aside said judgment (*Art Metal Works* v. *Abra-*

ham and Strauss, 107 Fed. 940, 944). This Court denied certiorari to review the later judgment setting aside the former (308 U. S. 621). It declined to review the original judgment on certiorari (293 U. S. 596). Since passage of a term deprived a federal court of power to set aside its own judgment (*United States* v. *Mayer,* 235 U. S. 55), then the judgment setting aside could only have been based on the ground that such disqualification of a judge rendered any judgment of the court in which he sat void. The case setting aside (107 Fed. (2d) 940, 944) the first judgment on said ground is cited with approval in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238, l.c. 245. The heart of the opinion in *Hazel-Atlas Glass* case is quoted and applied by the Missouri court in *Sutter* v. *Easterly,* 189 S. W. (2d) 284, l.c. 287-288. There, as here, an attorney conspired to obtain a judgment by fabricated evidence. His client was not a party thereto. Said court said: "The facts in the Hazel-Atlas case show more extensive fraud and one in which the client participated" (l.c. 288, column 2), as here. The supreme court of Missouri denied appellants herein the benefit of the principle it applied in that decision. In *Leichty* v. *Kansas City Bridge Co.,* 190 S. W. 2d 201, the Missouri Supreme Court en Banc held that fraud upon the court and violation of the requirement of due process rendered a Kansas judgment void, and authorized recovery for damages, regardless of the void judgment. The failure of the Missouri court to give appellants the equal protection of the laws, so declared by itself, denied to appellants each and all of the rights secured by the XIVth Amendment to the Federal Constitution, which said court did by deciding that appellants were not denied due process, and that the petition did not state a cause of action, in connection with the other questions involved.

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The court erred in affirming the judgment because based on the finding: "And upon the record and from suggestions of counsel for said defendants now appearing, the court finds that a third petition of the plaintiffs has been found insufficient upon said ground and that the said defendants are entitled to have plaintiffs' action dismissed as to them and to recover treble costs within and pursuant to the provisions of Section 948, Revised Statutes of Missouri, 1939."

Said finding was based in part upon the "suggestions of counsel for said defendants" (424). This was error violating appellants' rights under the XIVth Amendment under the decisions in *Ensminger* v. *Powers*, 108 U. S., l.c. 298-302, and *Kelley* v. *Town of Milan*, 221 Fed. 842. Mr. Justice Matthews, sitting on circuit in *Kelley* v. *Town of Milan*, concurred in the following statement: "And in *Ensminger* v. *Powers*, 108 U. S. 292, S. C. 2 Sup. Ct. Rep. 643, a very remarkable case, the court denied effect to a plea of *res judicata* on a bill of review, because the decree pleaded was not the 'deliberate judgment of the court upon the facts in the record,' and 'the functions of the judge were abdicated,' etc. It is a very instructive case." (l.c. 869).

The record shows that said finding was the basis of the final judgment dismissing the case on the merits and assessing a penalty. The record also shows that said finding based on the "suggestions of counsel for said defendants now appearing" was made after a denial of appellants' request to be heard (421). The record shows the following entry before the judgment entry: "And at the same time, and as a part of the same proceeding and order sustaining said alleged demurrers, said Circuit Court, without any evidence having been offered to sustain same, and without notice thereof or hearing or jurisdiction so to do, made and entered the following order and judgment

in said court and cause:" (406). The record shows that said finding was incorrect because the record discloses that one non-pending demurrer and three not lawfully pending demurrers were sustained to the first amended petition. It also shows that the appellees admit that the decisions as to demurrers sustained to the third amended petition were based on untrue statements contained in appellees' briefs that the allegations in the amended petition were false, notwithstanding their demurrers admitted their truth. (306-307).

The fact that Judge Ridge placed the recital in the record showing that his decision was in part based on the suggestions of counsel for appellees, together with the fact that some months afterward, over the objection of the appellees, he allowed a bill of exceptions, indicates that he desired to have the record show the basis of his rulings, as did the judge in *Ensminger* v. *Powers,* 108 U. S. 292, where it is said l.c. 301: "It is quite apparent that the judge intended that what occurred should be spread before this court on appeal, so that its effect on the validity of the decree might be considered."

B. The Missouri Partnership Administration Statute Conflicts With the XIIIth and XIVth Amendments and Treaty With France of April 30, 1803.

The validity of the Missouri partnership administration statute (Article 3, Chap. I, R. S. Mo. 1939), and particularly Sections 86, 87 and 88 thereof, was drawn in question (288-291) by appellants because of conflict with the XIIIth and Section 1 of the XIVth Amendments, the attainder prohibition of Section 10 of Article 1, and Article III of the Treaty with France of April 30, 1803 (290) (8 Stat. at L. 200-202). It was alleged and admitted that said statutes were enacted by the Missouri legislature in the year 1845 (288) (R. S. A.),

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pursuant to authority given to Missouri by the void Section 8 of the Act of Congress of March 6, 1820 (290) admitting Missouri to the Union and known as the Missouri Compromise (288-291). The validity of said Section 8 was drawn in question by reason of its conflict with the XIIIth and XIVth Amendments in authorizing involuntary servitude in Missouri.

Though held invalid in *Scott* v. *Sandford*, 19 How. 393, as to territory north of Missouri, the compromise as to Missouri was held valid in that case by this Court, and by the state court in this case, though void. Even had it been valid before, said Amendments made it void (*Kaugauna Water Power Co.* v. *Green Bay, etc. Co.*, 142 U. S. 254).

The Federal question arising out of the decision necessarily involved therein is therefore *per se* and inherently federal. (*State ex rel.* v. *Smith*, 177 Mo. 69, l. c. 94-95, citing *Kaugauna Co.* v. *Green Bay, etc., Co.*, 142 U. S. 254; *Wilson* v. *Black Bird Creek Marsh Co.*, 27 U. S. (2 Pet.) 245; *Armstrong* v. *Athens County*, 41 U. S. (16 Pet.) 281; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake and Y. Canal Co.* v. *Yuba County Super. Ct.*, 116 U. S. 410."

In *New Orleans* v. *De Armas*, 9 Pet. 224, this Court held it was without jurisdiction unless the right asserted "is protected by the Treaty ceding Louisiana to the United States or by some Act of Congress." It held that if any rights secured by the Treaty were violated that "the individual supposing himself to be injured, might have brought his case into this court, under the twenty-fifth section of the Judicial Act" (l. c. 234-235). And further, "where an act of Congress attempted to divest a title which was vested under the pre-existing government"—that is, vested under the Treaty—this Court would have jurisdiction. The act of admission of a state was held, in *New Orleans* v. *De Armas, supra,* to render the Treaty obsolete. But, being

void as to Missouri, the act of admission did not have that effect. The Treaty securing the protection of the Fifth Amendment to the inhabitants of Louisiana Territories remained in force after admission. Article III had the same effect as a similar provision in the Treaty with Russia (*Rassmussen* v. *United States*, 197 U. S. 516).

To hold otherwise as to these partnership statutes enacted in the year 1845 would be a construction not unlike the construction put upon a treaty referred to by Puffendorf, b. 5 c. 12, between two nations in which one stipulated to restore to the other one-half of the ships which they had taken, and then, after entering into the treaty, performed it by sawing the whole of them in two, by which they rendered the treaty wholly useless—a construction which Puffendorf reprobates with great severity.

However, the validity of said partnership administration statute and of said Act of Congress was specifically drawn in question in appellants' pleading (288-291, 156). And so the inherent nature of said federal question, in and of itself, supplemented by the way in which it was questioned by appellant, and decided by the State court, brings this case strictly within the obligatory appellate jurisdiction of this Court (*Whitfield* v. *Ohio*, 297 U. S. 431).

Section 87 of said partnership administration statute directed that on demand Thomas S. Moffett as surviving partner must surrender his own property to the administrator of the deceased partner. It also commanded him to give all reasonable information and reasonable facilities for the execution of his trust to said representative. Since said section compelled all survivors to surrender their own property on pain of being sent to jail, as provided in Section 88, without a judicial trial, the statute was void under the due process provision of the XIVth Amendment. It was also void because of the indefinite character of the

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information and facilities which he was compelled to give to said representative, on pain of being sent to jail (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, l. c. 89, 91). Said decision is cited with approval in *Screws* v. *United States*, 325 U. S. 91. See also *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, approved in *Star Square Auto Supply Co.* v. *Gerk*, 325 Mo. 968, 996; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Collins* v. *Kentucky*, 234 U. S. 634; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *In re Thompson*, 117 Mo. 83, 89, 90, Court *In Banc.*

Compelling the survivor to give "reasonable information" and "reasonable facilities," to Commerce Trust Company on its demand (in this concrete instance involving assets of one partnership admitted by appellants to be worth $650,000.00 (289), and which assets were in several states), condemned the surviving partner, Thomas S. Moffett, to involuntary servitude (*Ex parte Drayton et al.*, 153 Fed. 986; *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25, 31; *Slaughter House* Cases, 16 Wall. 36), in violation of the XIIIth Amendment.

The validity of the Missouri statute, Section 948 R. S. Mo. 1939, was drawn in question on the ground of conflict between said statute and the provision that "No State shall • • • pass any bill of attainder" (Art. I, Sec. 10 of the Constitution). Said statute, as applied herein by the trial court, was void because contrary to the law of the State and Nation, in that the trial court, without a hearing, and by denying appellants' request for a hearing (421) required by the rules (402-406), was binding on the court (*Meierhoffer* v. *Hansell*, 294 Mo. 195). That judgment (424-425) forfeited appellants' right to maintain the action or to institute another, and, with its assessment of a penalty, made said statute a mere legislative decree and a true bill of pains and penalties. It forfeited appellants' fundamental right

to maintain the suit for the loss caused by the deprivation of the rights secured by the provisions of Section 1 of the XIVth Amendment. *Cummings* v. *Missouri*, 4 Wall. 277; Cooley on Principles of Constitutionl Law, pages 311-312 says: "And a case in which the punishment is imposed indirectly, as by depriving one of the right to follow his occupation, *or to institute suits*, • • • is as much a bill of attainder as is an act directly imposing a punishment." In *Chambers* v. *Railroad Co.*, 207 U. S. 142, l. c. 148, it is said: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

In *State* v. *Powers*, 17 Atl. 969, 51 N. J. L. 432, 14 Am. St. Rep. 693, the court said: "Among civil rights is the right to prosecute and defend actions in the courts of the Commonwealth according to the established rules of practice. This proposition is sufficiently vindicated by a reference to the civil rights cases in the Supreme Court of the United States (100 U. S.) where it is assumed by all the justices of that tribunal."

In *Bell et al.* v. *Hood et al.*, 66 Sup. Ct. 773, it is said: "The party who brings a suit is master to decide what law he will rely upon" (l. c. 775).

These considerations make said question an inherently substantial federal question.

The jurisdiction of the court to apply Section 948 was conditioned upon the statutory provision that three petitions had been rightfully held insufficient on demurrer. Three petitions had not been lawfully held insufficient on demurrer. The first amended petition was held insufficient, on one non-pending demurrer and three demurrers unlawfully filed, by Judge Terte after it had been held sufficient

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by Judge Buzard's orders, and while Judge Buzard's orders sustaining it remained unchanged. The opinion herein attempted to justify Judge Terte's orders (193 S. W. (2d) l. c. 591-592) by stating that his rulings were on an amended petition different from that which had been ruled upon by Judge Buzard. Even the opinion itself correctly shows that there was no basis for that attempted justification, as it declares (193 S. W. (2d) l. c. 589, 3d Par.), before reaching the attempted justification part, that the pleading as to which Judge Buzard overruled demurrers and Judge Terte sustained demurrers was the same. This earlier statement in the opinion is sustained by the record (47, 60-61), and the attempted justification part is contradicted. Judge Ridge applied Section 948 when three petitions had not lawfully been adjudged insufficient on demurrers of appellees. It cannot lawfully be held that because a petition was held insufficient on a non-pending demurrer that it was held insufficient on a pending demurrer.

It was the duty of Judge Ridge, when he undertook to render the judgment disposing of the case, to examine the rulings of the preceding assignment judges in the case, including his own as such, and correct the error on which the rulings were based, and grant a hearing as to such questions to appellants (*Kinsella* v. *Kinsella*, 353 Mo. 661, l. c. 669 (4). It was also his duty, before sustaining the last demurrers and before rendering any judgment, to accord to appellants the hearing required by the rule 29 (402-403) as to the part consisting of demurrers, and statute (Sec. 965, R. S. Mo. 1939) as to the parts of the pleadings consisting of motions (*Meierhoffer* v. *Hansel*, 294 Mo. 195). The fact that he failed to do so, according to the definition of a bill of attainder given in the opinion herein (193 S. W. 2d, l. c. 592 (10)), made the statute, as construed and applied herein, a mere legislative decree or bill of pains and penalties.

See statement of Mr. Justice Matthews in *Hurtado* v. *People of California*, 110 U. S. l. c. 535-536.

Appellants' rights to the protection of the law of the State of Missouri, under the XIVth Amendment, were denied to them. "The Fourteenth Amendment applies to the common law policy as well as the statutory policy of a State." (*Barber* v. *Time, Inc.*, 348 Mo. l. c. 1203; *Federation of Labor* v. *Swing*, 312 U. S. 321). But the common law of Missouri is statutory law (Section 645, 646 R. S. Mo. 1939; *Tennessee Coal & Iron Co.* v. *George*, 233 U. S. 354). The force of the Act of Congress of June 4, 1812, adopting the common law in Missouri is not yet spent (*Davis* v. *McColl*, 179 Mo. App. l. c. 204-205). According to that common law, liability for damages resulting from overt acts incidental to an unlawful conspiracy is authorized in Missouri (*Kansas City* v. *Rathford*, 353 Mo. 1130; *Ruckels* v. *Pryor*, 351 Mo. 819, l. c. 846, quoting the *Teapot Dome* case by this Court).

The conspiracy herein involved is treated as an independent tort in Missouri. The participants in the conspiracy, by force of numbers and by reason of the fact that they included powerful politicians backed by great financial resources, possessed that peculiar power of coercion and injury which an ordinary individual standing in a similar relation to the victim does not have. *Shaltupsky* v. *Brown Shoe Co.*, 350 Mo. 835, recognizes the existence of conspiracy in Missouri as an independent tort, adopting the description of that variety of conspiracy described in 15 C. J. S., p. 1002, Sec. 8. *Baucke* v. *Adams*, 188 S. W. (2d) l. c. 366 refers to that brand of conspiracy.

The most ancient statute with reference to such conspiracies has been incorporated into the law of Missouri (*State* v. *Dalton*, 134 Mo. App. l. c. 528-529). That statute is 33 Edward I. It describes appellees herein: "Con-

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spirators be they that do confederate or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other * * * falsely to move and maintain pleas." The phrase "falsely to move or maintain pleas" includes fictitious civil actions (*State* v. *Bacon*, 61 Atl. 653). At common law "falsely to move or maintain pleas" subjected the conspirators to the liability outlined in Coke's Institutes Part III, p. 222, thus: "But in a writ of conspiracy at the suit of the party grieved, the judgment is, damages to the party, fine to the King and imprisonment."

That common law, both as to damages, fine and imprisonment, has long been the law of Missouri. See foregoing decisions and Section 4632 R. S. Mo. 1939, making it a misdemeanor for conspirators falsely "to move and maintain any suit," or "to commit any act * * * for the perversion or obstruction of justice, or the due administration of the laws." Said statute has been in force since A. D. 1825 (Mo. R. S. A.). *Aikens* v. *Wisconsin*, 195 U. S. 194, declares: "* * * the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law * * * requires a justification if the defendant is to escape * * * (l. c. 204). "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law" (l. c. 206). There *Quinn* v. *Leatham*, A. C. 495, is thrice cited. There it is said: "Essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion the same * * * The number and the compact give weight and cause danger * * * It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present * * * A number of acts and none in themselves not actionable or unlaw-

ful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gun-powder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in large quantities with a view to harm may be fatal as a poison."

And so the intentional administration of the over-doses of legal and illegal medicine to appellants in this case were highly destructive, and the large quantities thereof, with a view to harm, were fatal to appellants' federal rights.

Chancellor Halsbury, discussing the same question in the same case, said that "Some men are a host in their individual selves: are lions; some multitudes are asses: e. g. Napoleon; Bismark: and the Nations whom they crushed." That statement illustrates the extraordinary power of these appellees in Missouri and Kansas.

The law applied in *Mogul Steamship Co.* v. *McGregor*, A. C. (1892), p. 25, has been adopted into the law of Missouri by the opinion in *Heim* v. *Belinder*, 97 Mo. App. l. c. 72. So that the action formerly referred to as a writ of conspiracy is regarded in Missouri as an independent tort, by means of which appellants were deprived of the foregoing federal rights.

C. The Judgment of the State Court Is Not Based on Non-Federal Ground

The judgment of the Missouri Supreme Court is not based upon an independent non-federal ground adequate to support it.

In *State ex Rel. Ry. Co.* v. *Hall*, 337 Mo. 1229, l. c. 1233, the Missouri Supreme Court well said: "Furthermore, we are bound by the rulings of the Supreme Court of the United States, which deny the right to apply a local rule of practice

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so as to defeat the plain assertion of a Federal right, such as in the case at bar, which is secured under the Constitution. Illustrative of that doctrine is Davis, Director General, *v.* Wechsler, 263 U. S. 22, which was a proceeding by certiorari to the Kansas City Court of Appeals, wherein it was held: 'The state courts may deal with that (a rule of practice) as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. . . . If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise or to bar the assertion of it even upon local grounds. (Creswill *v.* Grand Lodge Knights of Pythias, 225 U. S. 246). This is familiar as to the substantive law and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See American Ry. Express Co. *v.* Levee, decided this day, ante, 19.' (See also Michigan Central Railroad Co. *v.* Mix, 78 U. S. 492, 73 L. Ed. 470.)"

In *Kalb* v. *Feuerstein*, 308 U. S. 433, at l. c. 439 this Court said: "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." In *United States* v. *Pink*, 315 U. S. 203, at l. c. 238 this Court said: "When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise national authority could be frustrated by local rulings. See Creswill *v.* Grand Lodge, K. of P., 225 US 246, 56 L ed 1074, 32 S Ct 882; Davis *v.* Wechsler, 263 US 22, 68 L ed 143, 44 S Ct 13." In *Jackson County* v. *United States*, 308 U. S. 343, l. c. 350, this Court said: "Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

The statute of Kansas, Section 22-1308 R. S. Kan. 1923 (250), alleged in the petition, as construed by the state court with reference to the Kansas judgments which the state court held valid, brings this case, on the question of jurisdiction, within the principles stated by this Court in *Adam* v. *Saenger*, 303 U. S. l. c. 64, where this Court said that "• • • since the existence of the federal rights turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here." In *Lovell* v. *Griffin*, 303 U. S. l. c. 450, one of the questions for determination was whether or not a federal question was adequately presented to and was decided by the state court. Chief Justice Hughes said: "Whether it was so presented and was decided is itself a Federal question. Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; Ward *v.* Love County, 253 U. S. 17, 22, 64 L. Ed. 754, 758, 40 S. Ct. 419; First Nat. Bank *v.* Anderson, 269 U. S. 341, 346, 70 L. Ed. 295, 302 46 S. Ct. 135; Schuylkill Trust Co. *v.* Pennsylvania, 296 U. S. 113, 121, 80 L. Ed. 91, 97, 56 S. Ct. 31. This Court has jurisdiction." (*Norris* v. *Alabama*, 294 U. S. l. c. 590; *Paterson* v. *Alabama*, 294 U. S. 600). In *Patterson* v. *Alabama*, l. c. 607, this Court said: "The Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." In *Abie State Bank* v. *Bryan*, 282 U. S. 765, at l. c. 773 this Court said: " 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.' See Creswill *v.* Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. Ed. 1074, 1080, 32 S. Ct. 822."

In *Broad River P. Co.* v. *State ex rel. South Carolina*, 281 U. S. 537, at l. c. 540 this Court announced the rule which

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applies to the claim that the state court denied appellants the protection of the Constitution of Missouri, Section 34, Article VI, against the void statutes providing for "Special judges" in that state. The denial of that protection as against said statute necessitates the assumption of jurisdiction by this Court under the following statement of the law: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded." This also applies to the denial of the protection of the common law of Missouri and of Sections 4632 *et seq.*

Fox River Paper Co. v. *Railroad Commission*, 274 U. S. 651, at l. c. 653-654, says: "The right set up in the bill is one under Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." The language in *Davis* v. *Wechsler*, 263 U. S. 22, is especially appropriate here. There this Court said, l. c. 24: "We are of opinion that the judgment must be reversed. Whatever spring*es* the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. • • • If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of

the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill *v.* Grand Lodge, K. P. 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822." See also *First National Bank* v. *Hartford*, 273 U. S. 548, l. c. 553.

The opinion of the Supreme Court of Missouri in Division 1 quoted a part of an allegation (193 S. W. (2d) l. c. 590, end 2d column) and then ruled that an action for libel was misjoined with an action for conspiracy, whereas the allegation (299-306) as to the false statements in appellees' briefs filed in the trial court alleged them to be "additional overt acts, pursuant to said conspiracies" (301), affecting the innocent and trusting judge of said court and causing him to sustain demurrers. The admission by the demurrers, in view of the fact that appellants' action was based on a conspiracy to deprive appellants of their federal rights, and the decision of the Supreme Court of Missouri to the effect that such overt acts constituted misjoinder of an action for libel and an action for conspiracy, is in conflict with the decision of this Court in *Truax* v. *Corrigan*, 257 U. S. 312, l. c. 328, wherein this Court reversed the decision of the Supreme Court of Arizona in a case in which it held that libelous publications by conspirators authorized relief in proceedings other than in the case then before the court. In reversing, this Court pointed out that "• • • such libels against the plaintiffs, though committed by thi particular class of tort-feasors (*Truax* v. *Bisbee Local, C. W. U.* 19 Ariz. 379, 171 Pac. 121), still the tort here committed was not a mere libel of plaintiffs. That would not have had any such serious consequences. The libel of the plaintiffs here was not the cause of the injury; it was only one step or link in a conspiracy unlawfully to influence customers."

Herein, the false briefs were merely a step or link in a conspiracy wrongfully to influence courts.

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D. There Was No Misjoinder of Causes of Action or of Parties Plaintiff

(a) The finding in the State court's opinion that the petition failed to allege joint ownership is contradicted by the pleading itself, and by the decision of the Supreme Court of Missouri applicable to its allegations.

The Supreme Court of Missouri overlooked the fact that, following its own example in the companion case of *In re Moffett Brothers Partnership*, 345 Mo. l. c. 745, wherein it said that appellants herein there "• • • in both of her capacities appealed. We hereinafter refer to her as appellant." So, following that precedent, the appellants' pleading alleged (154-155) that "Plaintiffs • • • will be described herein as plaintiff."

It was sufficient to alleged joint ownership in both capacities to allege that "plaintiff is lawful owner" (286, 322) of the properties of which she was so deprived. (*Duff* v. *Eichler*, 336 Mo. 1164, l. c. 1168; *The Planet Property and Financial Co.* v. *Railway Co.*, 115 Mo. 613, l. c. 619; *Jones* v. *Schaff Bros. Co.*, 187 Mo. App. 597, 602).

The pleading alleges not only that plaintiff in both capacities (286) "is lawful owner" of the properties of which she was so deprived, but also that said property (322) "is, and was, a part of the gains of the industry of plaintiff and her late husband, Thomas S. Moffett, the ownership and enjoyment of which by plaintiff and her said husband was recognized by Section 4 of Article II of the Missouri Constitution." It further alleged that the overt acts of the appellees "deprived them of the natural rights to the enjoyment of said gains of their own industry • • • Plaintiff further states that the property of which plaintiff was so deprived consisted of both real and personal property, and that the interests of plaintiff in the said property were and are intermingled, as shown herein,

which interests have been lost to plaintiff jointly in said capacities as the result of the same overt acts and transactions by reason of the matters and things stated and alleged herein, and as a direct result of the wrongful acts of the defendant pursuant to the conspiracies herein alleged" (322). See Syllabus 22, Thomassen's Estate, 171 S. W. (2d) 555.

(b) Even had there been a misjoinder of parties plaintiff, such misjoinder is not a ground of demurrer under Section 922 R. S. Mo. 1939, and could not constitute the basis for a dismissal under Section 948, authorizing dismissal if three petitions have been found insufficient on demurrer.

(c) In *Scott* v. *Alton Banking Co.*, 175 S. W. 920, and *Fadler* v. *Gabbert*, 333 Mo. 851, the Missouri Supreme Court has expressly decided that the inclusion of too many parties, or misjoinder of parties plaintiff, does not render a petition demurrable on the grounds of a defect of parties plaintiff.

(d) In the authorities cited in the opinion, to-wit: *Hallen* v. *Smith*, 305 Mo. 157, and *State* v. *Trimble* (Mo.) 262 S. W. 357, that question was not in issue. *Hallen* v. *Smith* dealt with parties defendant. It was not a decision on a pleading, but merely held that the evidence failed to show that one defendant was liable. *State* v. *Trimble* was an opinion by the court *en banc*, in which only two judges concurred and two dissented, and two concurred in the result. In *State ex rel. Hopkins* v. *Daues*, 319 Mo. l. c. 740, such a decision was held not to be a decision of the Court *en Banc*. There is no difference between this case and *Kammeyer* v. *City of Concordia*, 352 Mo. 742, wherein too many plaintiffs were joined and hence, according to the opinion herein, stated no joint cause of action. Nevertheless, the Supreme Court of Missouri reversed. That was a conspiracy case in which, in addition to alleging the conspiracy (l. c. 745) "also

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alleged that said persons committed thirty-two fraudulent acts in carrying out the conspiracy. * * * Defendants' demurrer to the petition was sustained. On plaintiffs' refusal to further plead, the court dismissed the petition. Since the petition there did not state a joint cause of action, and the judgment of dismissal was reversed, the law as declared in the opinion herein is directly contrary thereto.

(e) Both the State and Federal decisions construing Section 922 hold that joinder of an heir and administrator as parties plaintiff to recover property, or damages for property of which they were deprived by the same acts by the same defendants, was not demurrable on the ground of misjoinder of parties plaintiff (*Armour* v. *Roberts*, 151 Fed. 846, 848, C. C. A. 8). This Court in *Miller* v. *Union Pacific Railroad Co.*, 290 U. S. 220-227, did not question the propriety of the same person as administrator of two estates, based on same wrongful acts as here, joining as plaintiffs in the same suit in a Missouri court under Section 922 of the Missouri Code. The Missouri court in *Hendon* v. *Kurn*, 351 Mo. 980, citing said opinion of this Court, affirmed a judgment brought by "the Widow and administratrix of decedent's Estate," wherein the propriety of the joinder was recognized.

Section 850 and 851 R. S. Mo. 1939 made the principle applicable in equity suits as to the joinder of parties plaintiff applicable herein (*McLain* v. *Atlas Assur. Co.*, 67 S. W. (2d) 849 (Mo.), and prevented misjoinder. And this was the Missouri and Kansas law. (*Hotchkiss* v. *Ogle*, 153 Kan. 156, l. c. 162; *Citizens Trust Co.* v. *Tindle*, 272 Mo. 681, l. c. 693; *Wilson* v. *Hartford Fire Ins. Co.*, 300 Mo. 1, l. c. 39-40; *Young* v. *Boatmen's Bank*, 171 S. W. (2d) 552, by Court *en Banc*, Syl. 22 and l. c. 563-564, incorporating *Parker* v. *Simpson*, 180 Mass. 334-341, into the law of Missouri by citing and approving it at l. c. 564; *Burford* v. *Aldridge*,

165 Mo. 419; *Crenshaw* v. *Ullman*, 113 Mo. 633, l. c. 638; *Butler* v. *Lawson*, 72 Mo. 227; *Meyer* v. *Adler*, 188 Mo. App. 607).

And so the alleged non-federal ground is not adequate justification for depriving appellants of their federal rights, nor sufficient to sustain the state judgment under the decisions of this Court in *Davis* v. *Wechsler*, 263 U. S. 22; *Ward* v. *Board of Commissioners of Love County*, 253 U. S. 17; *Lawrence* v. *State Tax Commission*, 286 U. S. 276; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux et al.*, 279 U. S. 737; *Brown* v. *Mississippi*, 297 U. S. 278; *Abie State Bank* v. *Bryan*, 282 U. S. 765.

The foregoing authorities establish the invalidity of the finding of the state court to the effect that: "Appellants have not been denied due process. They have not only had their day in court, but their months and years" (193 S. W. (2d) l. c. 592, bottom 2d column). Appellants' complaint in this case is that she has been kept too long in court by the appellees, whose fourteen fictitious suits have been pending since 1930, for the purpose of preventing her, in violation of her federal rights, from getting possession of and enjoying the fruits of her husband's and her own industry, in addition to the loss resulting from the void judgments in the Kansas courts.

The state supreme court cites two cases by this Court wherein it denied certiorari, overlooking the consideration often stated by this Court that a denial of certiorari is never a ruling of this Court on the merits. In the case reported in 298 U. S. 675, no party appellee in this case was a party in that case (*Bigelow* v. *Old Dominion G. M. Co.*, 225 U. S. 111). The rule applied in *Bigelow* v. *Old Dominion &c*, 225 U. S. 111, conflicts with the finding of the state supreme court herein.

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The opinion cites Kansas cases which, together with those of this Court, were relied upon by appellees in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, and concerning which cases that Missouri court found facts which devitalized said Kansas judgments and proceedings (345 Mo. 741-751). The last decision controls (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66). See also *State ex rel. Miller's Admr.* v. *Bindlinmaier*, 26 Mo. 483, l. c. 486; *State ex rel. Mueller's Admr.* v. *Reinhardt*, 31 Mo. 95.

Not only did the decision in 345 Mo. 741 devitalize the Kansas judgments by its finding that the interests of the estate represented by Commerce Trust Company in that litigation were in conflict, which finding was the basis or premises of the judgment, but said Kansas judgments were also devitalized under the principles formulated in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, which principles have been incorporated into the jurisprudence of Missouri by its Supreme Court in *Sutter* v. *Easterly*, 189 S. W. (2d) 284, l. c. 288.

The decision of the Supreme Court of Missouri *en Banc* in *Leichty* v. *Kan--- City Bridge Co.*, 190 S. W. 2d 201, authorized appellants to recover herein notwithstanding the rendition of said Kansas judgments, for there the Supreme Court of Missouri *en Banc* overruled many cases denying a right to recover unless the void judgments were set aside in equity, citing *Stuart* v. *Dickinson*, 290 Mo. 516, and many other decisions including that of *Williams* v. *North Carolina*, 325 U. S. 226. The Supreme Court of Missouri in Division 1, by failing to give appellants the benefit of the law declared by the Supreme Court of Missouri *en Banc* in *Leichty* v. *Kansas City Bridge Co., supra*, denied appellants the protection of the law guaranteed by the XIVth Amendment. The Federal Question is raised in the Motion for Rehearing

or to transfer to the Court *en Banc*, which was the first opportunity to do so.

The question as to whether or not an action to recover damages for loss resulting from a judgment fraudulently obtained, and for said reason void, whether in a domestic or foreign jurisdiction, is elaborately discussed in *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899. Certiorari to review said decision was denied on June 4, 1945, 325 U. S. 874.

The finding of the Supreme Court of Missouri that appellants have had their day in court with reference to the Kansas litigation mentioned in the petition is based solely upon the opinions rendered in the Kansas courts, which were not before the Supreme Court of Missouri in this case, under the practice recognized in Missouri (*Friedman* v. *Maryland Casualty Co.*, 228 Mo. App. 680, l. c. 688). And in making such finding the court wholly ignored the facts pleaded in the petition which, being admitted to be true by appellees' demurrers, invalidated all of the judgments of the Kansas courts for the purpose of the decision.

The judgment of affirmance by the supreme court of Missouri is not based upon the provisions of Sections 922 and 948 of the old code. Since neither section authorizes a demurrer for misjoinder of parties plaintiff, the court was without jurisdiction to inflict a penalty on a ground not within the letter or spirit of either section, and thus deprive appellants of their Federal or State rights (*Nicholas* v. *Kelley*, 159 Mo. App. 20, l. c. 29; *State ex inf.* v. *Railroad*, 238 Mo., l. c. 612).

Section 922 never did include the ground of misjoinder of parties plaintiff as a ground of demurrer, though it did include the failure to state a cause of action and a misjoinder of causes of action as grounds for demurrer. These sections, while in force on the day the trial court rendered its judgment, yet in its opinion the supreme court of Mis-

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souri expressly stated that said Section 922 is "now repealed" (193 S. W. (2d) l. c. 590, top of page.) Section 948 was also repealed by the new Code. Hence, when the judgment of affirmance was entered on February 11, 1946, the Supreme Court was bound to apply the law as changed, and to refrain from applying the repealed law in support of the judgment (*Simpson* v. *Stoddard County*, 173 Mo. 421). And the failure to follow the law as declared by said decisions *en banc* denied to appellants the equal protection of the laws under the XIVth Amendment.

Since the state supreme court could not, on reversal, enter the same judgment, since said Sections 922 and 948 R. S. Mo. 1939 are repealed, then such judgment on reversal would not be "futile," and the principle stated in *Murdock* v. *Memphis*, 20 Wall. 590, l. c. 635, and kindred cases, as a reason for failure to reverse because of error as to federal questions has no application, under the rule stated by this Court in *American Steel Foundries* v. *Tri-City C. T. Council*, 257 U. S. 184, l. c. 201, when it said: "The complainant had no vested right in the decree of the district court while it was subject to review. • • • The circuit court of appeals was called upon to approve or to change the decree, and was obliged, therefore, to regard the new statute in his conclusion, and so are we."

The decision of the supreme court of Missouri in the companion case of *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, finding that Commerce Trust Company and B. C. Howard represented conflicting interests, was a finding with reference to conflicting interests which was *res judicata* and devitalized the Kansas judgments and proceedings under the law of the State as declared by its Supreme Court *En Banc* (*State ex rel. McKittrick* v. *Missouri Public Service Corporation*, 351 Mo. l. c. 973). Said finding constituted the premises on which the judgment was based,

and was as conclusive as the judgment itself. In failing to give effect to said decision, on the issue as to the invalidity of the Kansas judgments, the State Supreme Court in Division 1 denied to appellant the protection of the laws as required by Section 1 of the XIVth Amendment.

The fact that the Supreme Court of Missouri, in Division 1, would fail to give effect to its own decision could not be anticipated. So that this question was first raised in the petition for rehearing and to transfer to the Court *En Banc*, and is therefore timely (*Saunders* v. *Shaw*, 244 U. S. 317, l. c. 320). See also *Brinkerhoff-Faris Trust & S. Co.*, 281 U. S. 673.

Notwithstanding the Federal questions involved in this case were such as gave the Supreme Court of Missouri *En Banc* appellate jurisdiction under Section 3 of Article V of the Missouri Constitution of 1945, Section 9 of which Article provides: "A cause in the Supreme Court shall be transferred to the Supreme Court *En Banc* when • • • a federal question is involved," which provisions of said Constitution are substantially the same as Section 4 of the Amendment of 1890 to the Missouri Constitution of 1875. That in overruling the said motion to transfer to the Court *En Banc* said Division 1 denied to appellants the benefit of said Constitutional provisions of the State, and thereby denied to appellants the protection of each and all of the provisions of Section 1 of the XIVth Amendment of the Federal Constitution.

Said Missouri Supreme Court *En Banc*, in *Lumber Co.* v. *Harvester Co.*, 215 Mo. 221, l. c. 234, holds that the decisions of this Court control the State court as to what constitutes a federal question within the meaning of the Missouri Constitution.

The fact that a Kansas state judge was a party to the conspiracy and participated in some of the overt acts oper-

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ates to make the question here involved one of the most important which was ever submitted to this Court. The question of the personal liability of said state judge is not directly involved in this case, though the validity of the judgments rendered by said judge, pursuant to said conspiracy, is involved. The fact that, in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. (2d) 240, the circuit court of appeals for the third circuit held that a judge who denied a litigant before him the protection of due process guaranteed by the XIVth Amendment, was personally liable to said litigant under R. S. Section 1979 (Sec. 43 Title 8 U. S. C.), operates to render the case in that circuit court of appeals, and that of the supreme court of Missouri herein, cases wherein the judgments, decisions and opinions are in direct conflict with each other as to the basic principle involved. In that case the court declared the legal effect of R. S. Section 1979 as follows, l. c. 250: "But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think the conclusion is irresistible that Congress by enacting the Civil Rights Act *sub judice* intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the Third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'Every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

Under the principle there applied the judgments rendered by the Kansas state district judge, and the orders made by him to give effect to these void judgments, were all void. As above stated, of course the question of his personal liability is not involved, but the principle which renders him liable renders all the proceedings before him void.

This consideration renders the judgment of the Supreme Court of Missouri and the judgment of the United States circuit court of appeals for the third circuit in such direct conflict as to make the question involved of such great public and national importance as to necessitate a review herein. This consideration necessitates review on this appeal under all the provisions of Section 237 Judicial Code. (*Noble* v. *Oklahoma City*, 297 U. S. 481, 489, 56 S. Ct. 562, 80 L. Ed. 816; *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189, 190, 55 S. Ct. 386, 79 L. Ed. 850; *Palmer Clay Products Co.* v. *Brown*, 297 U. S. 227, 228, 56 S. Ct. 450, 50 L. Ed. 655; *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, 55 S. Ct. 884, 79 L. Ed. 1631; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 54 S. Ct. 573, 78 L. Ed. 1123.)

The Supreme Court of Missouri held that appellants' federal rights did not depend upon the supreme law, but that they depended upon the discretion of the trial judge (193 S. W. (2d) l. c. 591 (4), contrary to *Meierhoff* v. *Hansel*, 294 Mo. 195, and the *En Banc* decision in *State ex rel.* v. *Hackman*, 274 Mo. 551, l. c. 558, thus denying appellants each and all of the rights secured to them by Section 1 of the XIVth Amendment to the Constitution.

To the said jurisdictional defects is added the greatest defect, to-wit: that Commerce Trust Company, as purported Missouri executor of the estate of John Moffett, and as purported Missouri administrator of Moffett Brothers partnership estate, without possession of or title to any assets in the State of Kansas of either estate (231), went to Kansas and fraudulently confessed a judgment against itself. That Commerce Trust Company could not lawfully appear in the Kansas district court to give it jurisdiction to render a judgment against it as Missouri partnership administrator and partially pay it with said assets (*Helme*

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v. *Buckalew*, 229 N. Y. 363, per Cardozo, J.; *McMaster* v. *Gould*, 240 N. Y. 379; *Thorburn* v. *Gates*, 225 Fed. 613; *Strohmeyer* v. *Aldrich*, 227 Fed. 960; *Estate of Thompson* v. *Coyle & Co.*, 339 Mo. 410). Said facts alone violated appellants' rights under Section 1 of the XIVth Amendment.

Picking et al. v. *Pennsylvania R. Co. et al.* first appeared in 3 F. R. D. 425 on April 25, 1944. The case was dismissed by senior federal Judge Albert W. Johnson of the middle district of Pennsylavnia. That decision was reversed by the circuit court of appeals for the third circuit on August 28, 1945, (See 151 F. (2d) 240). A rehearing was denied on October 3, 1945 (152 F. (2d) 753). On January 11, 1946, similar rulings were made, as shown in 5 F. R. D. 76, 84. The report in *United States* v. *Johnson*, 65 Fed. Sup. 42 and 65 Fed. Sup. 46 indicates that the district judge who dismissed the *Picking* case was indicted for conspiracy to render, and rendering, decisions between the years 1934 and December 1944.

It appears from the foregoing that twice a federal district court has followed the law as declared twice by the circuit court of appeals in the *Picking* case, and that the law as thus declared is the law in the Third Circuit. It also appears that the judge who dismissed same on April 25, 1944, was charged in an indictment to be a corrupt judge for acts committed during a period which included the date of dismissal. However, the part of the indictment included in the report does not mention the *Picking* case.

Appellees have admitted that the acts of the Kansas state district judge, which they twice admitted to be true (once in their demurrers to the third amended petition and once in their demurrers to the fifth amended petition) were acts of a corrupt judge (299). (Appellants had not used that language.)

The state court, nevertheless, affirmed a judgment of the circuit court of Jackson County dismissing the petition herein and finding that appellants were accorded due process of law by the judge whom appellees thus twice admitted to be corrupt. This circumstance discloses that at least in the State of Missouri the law with reference to the rights of a litigant under the Civil Rights Acts and the Civil War Amendments has been declared differently from the way in which it has been declared by the highest court in the Third United States Circuit,—a fact which of itself renders the question here involved one of great public importance.

As to appellants, the Kansas litigation, as admitted by appellees, indicated the existence of a condition similar to that in England in 1688, well described in *Rex* v. *Rowan* as a time "When the devoted benches of public justice were filled by some of those foundlings of fortune, who, overwhelmed in the torrent of corruption at an early period, lay at the bottom, like drowned bodies, while soundness or sanity remained in them; but, at length, becoming bouyant by putrefaction, they rose as they rotted, and floated to the surface of the polluted stream, where they were drifted along, the objects of terror, and contagion, and abomination." Corrupt judgments are always void.

The state court ignored the allegation that appellees kept fictitious suits for $2,539,366.80 (268), with six per cent interest per annum, pending since 1930 for the purpose of depriving appellants of the rights specified in Section 1 of the XIVth Amendment. The state court ignored the provisions of Section 10 of Article II of the state constitution of 1875, and of Section 14 of Article I of the state constitution of 1945, commanding that right and justice shall be administered without denial or delay. Appellants were entitled to the protection of said provisions of the state con-

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stitution with reference to said fictitious suits, and its protection was denied by the state court. To so deny the protection of the state constitution was also a direct violation of the command of the provisions of Section 1 of the XIV Amendment, and each of them.

The presidential message of February 5, 1937, to the Congress gives the basic reason for said constitutional provisions thus:

> "'Delay in any court results in injustice.
>
> 'It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.'"

Appellees, acting in concert with appellee Howard, instituted said fictitious suits. As recently as May 14, 1946, the question with reference to the unlawful acts of appellees through Howard is well stated:

> "There is nothing better settled than that a lawyer may not lawfully represent interests which are conflicting in the sense that it would be his duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose. Rule 4.06 of the Supreme Court of Missouri; Moffett Bros. Partnership Estate *v.* Moffett, 345 Mo. 741, 137 S. W. (2d) 507; Hoffman *v.* Hogan, 345 Mo. 903, 137 S. W. (2d) 441 • • •"
>
> In Re Pfiffner's Guardianship, 194 S. W. (2d) 233, l. c. 236.)

The decision in *In re Moffett Brothers Partnership Estate*, 345 Mo. 741, for a number of years, has been a guide

to other courts as to the question decided in that case. Yet the Supreme Court of Missouri, in its opinion herein, wholly ignored its said finding in that case that the acts of Mr. Howard and Commerce Trust Company in the Kansas litigation were unlawful, and ignored the consideration that all the appellees, acting in concert and conspiracy, were liable for the damage caused by said unlawful acts. In thus failing to give effect to said judgment as to said unlawful acts, the state supreme court also denied appellants' Federal rights.

These facts necessitate an assumption of jurisdiction of this case so that the supreme law may be enforced.

Appellants adopt and make the Motion for Rehearing and to Transfer to the Court *en Banc* in the State Supreme Court, and Assignments of Error herein filed, a part hereof, as fully as if set forth as a part of this jurisdictional statement.

Whenever the word CONSTITUTION has been used in the foregoing statement, the Constitution of the United States is meant, unless otherwise specified.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code as Amended. And, as to those Federal Questions not involving the validity of any statute, this Court has jurisdiction on this appeal to grant the same relief as on certiorari under Section 237(b) of the Judicial Code as Amended (*Prudential Life Insurance Co.* v. *Cheek*, 259 U. S. 530; *Flournoy* v. *Wiener*, 321 U. S. 253-275, l. c. 263).

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

EXHIBIT "A"

193 S. W. 2d, pages 588 to 592

MOFFETT v. COMMERCE TRUST COMPANY, ET AL.

No. 39509

SUPREME COURT OF MISSOURI, DIVISION No. 1

Feb. 11, 1946

Rehearing Denied April 8, 1946

Appeal from Circuit Court, Jackson County; Albert A. Ridge, Judge.

Actions by Louise McGrew Moffett and Louise McGrew Moffett, as executrix of the estate of Thomas S. Moffett, deceased, against the Commerce Trust Company and others, to recover damages, etc., wherein defendant filed separate demurrers to plaintiffs' fifth amended petition. From a judgment sustaining the demurrers and dismissing the petition, plaintiffs appeal.

Affirmed.

CLARK, Judge:

On December 30, 1944, Judge Ridge, Presiding Judge and Judge of Division 6 of the Circuit Court of Jackson County, sustained separate demurrers filed by the various defendants to plaintiffs' fifth amended petition on the ground of misjoinder of parties plaintiff and, finding that a third petition of plaintiffs had been found insufficient on said ground, dismissed the petition and rendered judgment against plaintiffs for treble costs under Section 948, Revised Statutes Missouri 1939, Mo. R.S.A. From that judgment plaintiffs have appealed.

The original petition with Louise McGrew Moffett as sole plaintiff was filed August 22, 1941. Afterwards the first amended petition was filed adding Mrs. Moffett, as

executrix of the estate of Thomas S. Moffett, as a plaintiff, and adding two new defendants.

To the first amended petition respondent Kopp filed a demurrer on the ground that no cause of action was stated against him. The other respondents attacked the petition by separate motions. All these were overruled by Judge Buzard, then presiding judge. Afterwards, respondents filed separate demurrers to this petition and they were sustained by Judge Terte, then presiding judge. Appellants filed a second and later a third amended petition. Judge Wright, then presiding judge, sustained separate demurrers to this petition. Successively appellants filed fourth and fifth amended petitions, demurrers to the latter being sustained by Judge Ridge as stated at the outset of this opinion.

The fifth amended petition, with attached exhibits, occupies two hundred pages of the printed record. The briefs are numerous and lengthy, aggregating thirteen hundred and fifty pages, citing and quoting from hundreds of decisions, many of which, we think, have no relevancy to any issue here involved. Appellants claim error under twenty-two numbered assignments, some being mainly a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately.

Appellants contend: that the reason assigned by Judge Ridge for sustaining the demurrers, misjoinder of parties plaintiff, was not authorized by Section 922, Revised Statutes Missouri 1939, Mo. R.S.A.; that he had no jurisdiction to pass on the demurrers without at least two days' notice to appellants under court rules; that he was precluded from passing on the demurrers because of previous rulings of Judge Buzard; that the alleged demurrers were really speaking demurrers, motions or answers; that it was proper to join appellants (as an individual and as executrix) as plaintiffs, and that this court so held in In Re Moffett Bros. Partnership, 345 Mo. 741, 137 S. W. 2d 507; that the ruling of Judge Wright in sustaining demurrers to the third amended petition was void because induced by false statements in respondents' briefs; that Section 948, supra, pur-

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porting to require dismissal and award of treble costs after three petitions have been held invalid, is unconstitutional.

(1) Appellants are in error in construing the new Civil Code, Mo. Laws 1943, pp. 353-397, Mo. R.S.A. Sec. 847.1 et seq., as declaring what the law was at the date of its passage. They reach this result by emphasizing the word "is" in the sentence "misjoinder of parties *is* not a ground of demurrer to an action," but they overlook further provisions of the Code, Sec. 3, to-wit: "This code will take effect on *January 1, 1945.* It governs all proceedings in actions brought *after* it takes effect and also *further* proceedings in all actions then pending, except * * *." (Emphasis ours.) Section 922, although now repealed, was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers. The section does not in terms list "misjoinder of parties" as a ground of demurrer, but does, among other grounds, list "defeat of parties plaintiff or defendant," and failure to "state facts sufficient to constitute a cause of action." Appellants say that as we copied the section from a law of New York we also adopted the construction placed upon it by the courts of that state, and cite some New York cases holding that misjoinder of parties is not a ground of demurrer. Appellants also cite Fadler *v.* Gabbert, 333 Mo. 851, 63 S. W. 2d 121, and Kammeyer *v.* City of Concordia, 352 Mo. 742, 179 S. W. 2d 76. In the Kammeyer case we held that a demurrer was properly sustained as to unnecessary plaintiffs, but that this did not authorize a dismissal as to the remaining plaintiffs. In the Fadler case (333 Mo. 851, 63 S. W. 2d 127) we recognized the distinction between "defect of parties" and "misjoinder of parties", but said that "misjoinder of parties", although not listed in the statute, is a ground of demurrer because in that situation the petition does not state a cause of action. See also Hallen *v.* Smith, 305 Mo. 157, 264 S. W. 665; State *v.* Trimble, Mo. Sup., 262 S. W. 357.

We will briefly set forth the general nature of the petition, but deem it unnecessary to make a complete summary. It alleges: that appellant's husband died testate, a resident of Missouri, and she is executrix and sole devisee; that he was a partner in several firms having a

common office in Kansas City, Mo., and owning property and doing business in various states; it purports to trace the administration of these partnerships through the courts of Missouri and Kansas; alleges that respondents have unlawfully appropriated much of the assets of the various partnerships by means of false book entries, perjured testimony, fictitious suits and in other ways; it recounts suits in various courts, one brought by Mr. Moffett in his lifetime and others after his death; says that judgments rendered in these cases are void because of perjured testimony at the trials or lack of jurisdiction because of void statutes; alleges that respondents have damaged appellant by libeling her and discrediting her attorneys. The petition says that the property of which she has been deprived is the fruit of the industry of herself and husband, but does not allege that she contributed any of her separate means either in money, property or the value of her labor. In another place (paragraph 9) appellant seems to claim sole ownership by virtue of her husband's will.

Appellants cite many cases decided by the courts of this and other states, but we feel confident that no case cited or that can be cited approves a petition such as the instant one. We concede that in some circumstances an executor and a devisee may join as plaintiffs. We also adhere to our previous ruling in the Kammeyer case, supra. But here we have a different situation. The petition attempts to state a joint cause of action in favor of Mrs. Moffett as an individual and in her favor as executrix of her deceased husband's estate. It does not seek to recover specific property belonging either to her or to the estate, but prays recovery on account of alleged wrongful acts which it is alleged resulted in damages to her and the estate jointly. True, the petition alleges "that said property of which plaintiff was so deprived is, and was, a part of the gains of the industry of plaintiff and her late husband." That is hardly sufficient to allege joint ownership, but even if it be so construed there are other allegations which show that the damages claimed could not possibly accrue to Mrs. Moffett and the estate jointly. The petition seeks to recover damages for alleged wrongful acts pursuant to a conspiracy said to have been entered into prior to the death

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of Mrs. Moffett's husband and continued after his death. Some of the acts complained of are alleged to have been performed long after Mr. Moffett's death and after the institution of the suit. Among other things it is alleged that some of the respondents, in briefs filed in the case, "published of and concerning plaintiff in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements * * *." Then in the prayer it is stated "that her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts * * * resulting in actual damage to plaintiff in the sum of $1,000,000.00." The prayer also is for punitive damages in the sum of $1,500,000.00.

(2, 3) Although it is alleged that libel was directed at Mrs. Moffett "in both capacities," it is clear that any damages recovered on account of this allegation could only accrue to her as an individual, and the executor, devisees or creditors of the estate would have no interest in such recovery. These allegations and many others show that no joint cause of action is stated. Such defect appearing on the face of the petition, under the old code, could be reached by demurrer. The defect is more than a mere inclusion of an unnecessary plaintiff, as in the Kammeyer case, supra. In the instant case the demurrers reached the entire petition for the trial court had no authority to sort out the allegations, if any, which constitute a cause of action in favor of Mrs. Moffett in one capacity and sustain the demurrers only as to the allegations relating to her in the other capacity. The petition fails to state a joint cause of action and it was unnecessary for the trial court and is unnecessary for this Court to determine whether a cause of action is stated in favor of Mrs. Moffett in either capacity. Rockwood *v.* Crown Laundry Co., 352 Mo. 561 178 S. W. 2d 440, loc. cit. 443; Doerr-Engel *v.* Tide Water Oil Co., 342 Mo. 1141, 119 S. W. 2d 402; Niederberg *v.* Golluber, Mo. Sup., 162 S. W. 2d 592, l.c. cit. 599. Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned

by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. Hartvedt *v.* Harpst, Mo. Sup., 173 S. W. 2d 65, loc. cit. 68; Bushman *v.* Barlow, 321 Mo. 1052, 15 S. W. 2d 329, 330.

(4) The circuit court of Jackson County is a multiple judge court. Its rules provide that the court en banc shall from time to time select one of the judges as Presiding or Assignment Judge, whose duty it is to pass upon motions and demurrers, make up the issues and assign cases to the different divisions, including his own division. Two days' notice is necessary to call up a demurrer unless waived or a different time be fixed by the Presiding Judge. The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules.

(5) Appellants say that Judge Ridge was without jurisdiction to dismiss the petition without determining that the previous demurrers had been properly sustained. The correctness of the rulings on former petitions was not before Judge Ridge and, although previous petitions are printed in the abstract, the question is not before us. By pleading over appellants waived the error, if there was such. Voorhees *v.* Louisiana Purchase Co., 243 Mo. 418, 147 S. W. 783; Tobin *v.* Bell Telephone Co., Mo. Sup. 199 S. W. 952; Buder *v.* Reller, Mo. Sup., 190 S. W. 2d 213.

Appellants' claim that Judge Ridge was under duty to reconsider the rulings of the former presiding judges is inconsistent with the claim that Judge Buzard's ruling is res judicata.

(6, 7) Appellants contend that Judge Ridge's ruling on the demurrers was invalid because constituting collateral attacks on Judge Buzard's former rulings; further, that the demurrers to the fifth amended petition were in truth motions, speaking demurrers or answers. We find no merit in these contentions. The pleadings ruled upon by Judge Buzard were motions to strike or to make more definite, except that respondent Kopp filed a separate demurrer on the grounds that the petition showed that he was not a necessary party and stated no cause of action against him. Later when demurrers to amended petitions were regularly presented successively to Judges, Terte, Wright and Ridge as assignment judges, each was under a duty to rule the law as he saw it regardless of the view that Judge Buzard may have had when passing on the previous motions. There was no collateral attack. The rulings were by the same court, although by different judges, on different petitions and at different stages of the case. State ex rel. *v.* Landon, 304 Mo. 654, 265 S. W. 529, 532; Kinsella *v.* Kinsella, 353 Mo. 651, 183 S. W. 2d 905, 908. The pleadings ruled upon by Judge Ridge were demurrers, nothing more. They may have contained repetition and surplusage, but the complaint as to defect of parties and failure to state a cause of action were clearly stated. Such could be determined from the face of the petition.

(8, 9) In Re Moffett Bros. Partnership Estate, 345 Mo. 741, 137 S. W. 2d 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate. Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. loc. cit. 745, 137 S. W. 2d loc. cit. 508. Some of the respondents in the instant case

were not parties to that suit. Certainly the decision in that case is not res judicata as to the sufficiency of the petition in the instant case. Appellants say that Judge Wright was induced to sustain demurrers to the third amended petition by false statements in briefs filed with him by some of the respondents; that, therefore, his ruling was void and could not be counted by Judge Ridge in holding three petitions had been held invalid. The question is not before us. If it was we would be concerned only with the correctness of Judge Wright's rulings, not his motives. For many reasons there is no merit in this contention; a sufficient reason is that appellants, by pleading over, waived the right to question Judge Wright's ruling.

(10) Appellants say that Section 948, supra, violates article 1, section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder. No authority is cited which remotely sustains this contention. This statute, until the effective date of our new Code, was in force for one hundred and twenty years. It has frequently been construed by this and other courts and, so far as we know, its constitutionality has never been assailed before. It does not resemble a "bill of attainder" or of "pains and penalties." See 16 C. J. S., Constitutional Law, sec. 452, p. 902, sec. 455, p. 903 It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions. Its constitutionality is presumed and appellants have offered nothing to rebut the presumption.

(11, 12) Nor does the failure of the section to specifically provide to whom the penalty shall be paid render it invalid. We think the trial court correctly interpreted the statute in rendering judgment for treble costs in favor of respondents.

Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this

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country and France in 1803 and the "due process" and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; Clark *v.* Andrews, 136 Kan. 23, 12 P. 2d 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. 2d 555; Id. 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; Moffett *v.* Robbins, D. C., 14 F. Supp. 602; Moffett *v.* Robbins, 10 Cir., 81 F. 2d 431, Id., 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years. None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action.

We hold that the judgment is correct in form and in accordance with law and it is therefore affirmed.

All concur.

EXHIBIT "B"

345 Mo., pages 741 to 751

In Re Moffett Brothers Partnership Estate, Styled on Abstract and Briefs as Commerce Trust Company and B. C. Howard *v.* Louise McGrew Moffett, and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Appellants.—137 S. W. 2d 507

Division One, March 6, 1940

Appeal From Jackson Circuit Court.—Hon. Brown Harris, Judge

Reversed and Remanded (with directions to enter judgment denying claimant additional fees in part and approving the payment of fees in part)

Bradley, C.:

September 10, 1936, B. C. Howard, an attorney, and hereinafter referred to as claimant, filed his petition in the

Probate Court of Jackson County (at Kansas City) asking for an allowance against Moffett Brothers partnership estate for legal services alleged to have been rendered the estate. The Commerce Trust Company was the administrator de bonis non of the estate, or so considered for purposes of this opinion. The petition alleged that the administrator employed claimant, and that since employment he "has continuously given legal advice and rendered legal services to the administrator for which he had received to date of filing petition the sum of $1300." Claimant further alleged "that the action of said administrator in the payment of said sum of $1300. as aforesaid, should be approved, and that said administrator should be authorized and directed to pay to" claimant "on account of legal advice and services rendered such additional amount as the court may deem right and proper in the premises."

Louise McGrew Moffett, individually, and as executrix of the estate of Thomas S. Moffett, her deceased husband, who was a member of the Moffett Brothers partnership, resisted the allowance of any further fee to claimant and endeavored to prevent the approval of the payment of the $1300. The matter, by appeal, reached the circuit court and that court, on January 25, 1938, allowed claimant an additional fee of $11,500 and approved the payment of the $1300. Louise McGrew Moffett, in both of her capacities, appealed. We hereinafter refer to her as appellant.

The record covers nearly 1400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate.

Moffett Brothers, a partnership, of Kansas City, Missouri, was composed of John and Thomas S. Moffett, brothers. For many years prior to August 23, 1927, the firm was engaged in farming and dealing in cattle in Missouri, Kansas, and Oklahoma. John Moffett died testate August 23, 1927, and at that time, according to claimant, the value of the partnership property was about $650,000. John Moffett, in

his will executed February 21, 1921, named his brother, Thomas S., as executor, and provided that, in the event Thomas S. was unable to act, the Commerce Trust Company would be executor. Thomas S. was appointed by the Probate Court of Jackson County as executor of the John Moffett estate on August 29, 1927, and also proceeded, as the sole surviving partner, to administer the partnership estate. August 17, 1928, Helen Moffett, John's widow, commenced proceedings in the probate court to remove Thomas S. as executor of the John Moffett estate on the ground that the interests of the John Moffett estate and the Moffett Brothers estate were conflicting. November 28, 1928, Thomas S. was removed as executor of the John Moffett estate, and the Commerce Trust Company (Kansas City) was appointed administrator *de bonis non* of the estate. December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question.

August 15, 1929, Thomas S. Moffett filed suit in the District Court of Harper County, Kansas, to partition some 8000 acres of land, in Kansas, belonging to the Moffett Brothers estate. Mrs. Helen Moffett, widow of John, and one of the defendants in the Kansas partition suit, in her answer, alleged that the Moffett Brothers estate was indebted to the John Moffett estate, and asked that an accounting be had before there was any partition. Represented by claimant, the Commerce Trust Company, as executor *de bonis non* of the John Moffett estate in Missouri, on June 9, 1930, asked and was granted leave to intervene in the Kansas partition suit. The petition to intervene was verified by claimant, and alleged, among other things, that the Moffett Brothers estate *was indebted* to the John Moffett estate in the sum of $91,375.18, and that the Kansas lands belonging to the partnership estate of Moffett Brothers was "not subject to partition until all of the obligations of said partnership have been fully satisfied."

July 23, 1930, the Commerce Trust Company, as executor *de bonis non of the John Moffett estate* in Missouri, and represented by claimant, having been granted leave, filed an intervening petition in the Kansas partition suit, which petition was verified by claimant, and, among other things, alleged "that *there is now due* to intervenor as executor *de bonis non* of the will and estate of John Moffett, deceased, a sum of money, which your intervenor is unable to ascertain; *that there is a disagreement and irreconcilable differences between the surviving partner and the estate of John Moffett, deceased, as to the amount due to said estate,* which makes it necessary for this court to require an accounting between the plaintiff (Thomas S. Moffett) as surviving partner, this intervenor, as executor, and the defendants herein who are heirs of said John Moffett, deceased, and further states that due to the many years of existence of said partnership and the complicated records that it will be impossible to adjust all of the differences and ascertain the rights and liabilities of all of the parties hereto in an action at law and that it will be necessary for a court of equity to take an accounting and determine the rights and liabilities of all of the parties hereto." (Italics ours.)

Thomas S. Moffett, plaintiff in the partition suit, resisted the accounting demands of Helen Moffett, and the Commerce Trust Company as executor of the John Moffett estate in Missouri, but was overruled by the trial court and appealed. The Supreme Court of Kansas sustained the ruling of the trial court, and held that there should be such "an accounting as prayed for by the defendant (Helen Moffett) and intervenor in order to determine the respective interests of the parties in the land sought to be partitioned." (Moffett *v.* Moffett et al., 131 Kan. 582, 292 Pac. 947, l. c. 950.)

The opinion was handed down by the Supreme Court of Kansas on November 8, 1930, and Thomas S. Moffett, plaintiff in that case, died testate December 22, 1930, and his widow, appellant here, was the sole beneficiary under his will and was named in the will as executrix and was so appointed by the Probate Court of Jackson County. January 5, 1931, Mrs. Grace Torrance Clark, a sister of appellant, was appointed, by the Probate Court of Wyandotte County,

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Kansas, as ancillary administratrix of the Thomas S. Moffett estate in Kansas, and on January 8, 1931, Mrs. Clark, by order of the Probate Court of Wyandotte County, Kansas, became administratrix of Moffett Brothers estate in Kansas.

February 14, 1931, the partition suit, on motion of Helen Moffett, and resisted by appellant and Mrs. Clark, was revived in the names (as plaintiffs) of appellant, as sole beneficiary under the will of her husband, Thomas S. Moffett, and Mrs. Clark, as ancillary administratrix of the Thomas S. Moffett estate in Kansas. There was no order of revival in the name of Mrs. Clark as ancillary administratrix of the Moffett Brothers estate in Kansas, but Mrs. Clark testified that as claimant was "prosecuting everything against the partnership" she endeavored "to protect the partnership." The partition suit, with its accounting feature, was tried in October, 1931. The Commerce Trust Company, in its dual capacity as executor *de bonis non* of the John Moffett estate in Missouri, and as administrator of the Moffett Brothers estate in Missouri, was represented by claimant. Mr. A. E. Watson, counsel for appellant in the present case, and counsel for her and Mrs. Clark in the partition-accounting suit, testified that *the principal contention* in the partition-accounting suit was whether or not Moffett Brothers estate was indebted to the John Moffett estate, and that appellant and Mrs. Clark, at the trial in Kansas, resisted this claim of indebtedness "to the best of their ability, and Mr. Howard, representing the Commerce Trust Company in its capacities, never interposed any objection to anything that took place in the trial of that case that would benefit the estate of John Moffett." And we might say that claimant does not contend that *the principal contention* in the partition-accounting suit was not as given by Mr. Watson.

The Kansas trial court, in the partition-accounting suit, found that the Moffett Brothers estate was indebted to the John Moffett estate in the sum of $143,829.96; that the Thomas S. Moffett estate was indebted to the Moffett Brothers estate in the sum of $27,399.25, and that the Moffett Brothers Cattle, Land & Lumber Company (an Oklahoma partnership in which John and Thomas S. were interested) was indebted to the Moffett Brothers estate in

the sum of $101,228.06, and this finding was affirmed by the Supreme Court of Kansas. (Clark et al. *v.* Moffett et al., 136 Kan. 711, 18 Pac. (2d) 555.) The question as to whether or not the Moffett Brothers estate was indebted to the John Moffett estate was a complicated one, and a fair notion of this complication appears in the Kansas Supreme Court opinion in the partition-accounting suit, as follows (18 Pac. (2d) l. c. 556):

"Does the evidence sustain the finding that Moffett Brothers was indebted to John Moffett? On this point the evidence may be summarized as follows: John Moffett and Thomas S. Moffett resided at Kansas City, Mo. They were equal partners in the firm of Moffett Brothers. When this partnership was formed is not definitely shown, but it had existed a long time, perhaps thirty years or more, when it was dissolved by the death of John Moffett. It was engaged in the ranching and live stock business, and owned and operated a number of farms and ranches, and had offices in the Livestock Exchange Building at Kansas City. John Moffett spent most of his time at the office, where they had bookkeepers and other clerical help. Thomas S. Moffett spent most of his time looking after the farms and ranches and the livestock thereon, going back and forth from the office to the various ranches. Each of them had property owned individually. Both of them were members of the partnership firm of Moffett Brothers Cattle, Land & Lumber Company, which was engaged in the livestock, land and lumber business in Oklahoma, the field work being looked after by the Oklahoma brothers, but the office business transacted at the Kansas City office. Both John and Thomas S. Moffett were members of a partnership known as Moffett Brothers & Andrews, which was also engaged in the live stock business. One or both of them were interested as members or otherwise in four other partnerships, namely, Andrews, Lewis & Moffett, Andrews & Lewis, J. C. Lewis & Co., and Andrews & Moffett. The books of all of these partnerships and of the personal business of John Moffett, and perhaps the personal business of Thomas S. Moffett, were kept in the one office at Kansas City and by the same office force. Collectively they transacted a large volume of business, amounting to many thousands of dollars each

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year. While notations or entries were made to identify the business of each of the partnerships or individuals, it was all entered in a common ledger which bore the names of 'Moffett Brothers & Andrews Ledger.' About 1924 they had a firm of accountants examine these books and open a separate set of books for the partnership of Moffett Brothers. Separate books were also opened for the partnership of Moffett Brothers Cattle, Land & Lumber Company. Separate books were opened for some, perhaps all, of the other partnerships, but that is not material here. The business of the partnership of Moffett Brothers thereafter was kept in the books of that firm until the death of John Moffett, and thereafter to the time of the trial of this action. These books were in court at the trial, and the entries in them, the testimony concerning some of those entries, and a summary of them prepared by accountants, known in this record as 'Commerce Trust Company Exhibit No. 8.' "

Mr. Watson testified that after the trial court made its decision in the Kansas partition-accounting suit he, as counsel for appellant and Mrs. Clark, asked claimant to file a motion for a new trial on behalf of the Commerce Trust Company as administrator of the Moffett Brothers estate and that claimant refused to do so; that the reason he made such request was that he was fearful that, unless the Commerce Trust Company, as administrator of the John Moffett estate in Missouri appealed from the judgment, the merits might not be for consideration on appeal.

Appellant in her statement says that claimant "in one of his pleadings" in the partition-accounting suit, alleged that Mrs. Clark, as administratrix of Moffett Brothers estate in Kansas "was without power to make a defense on behalf of said partnership estate" in that suit. Claimant devotes forty pages of his brief to what is called an "analysis" of appellants statement of the case, "and says that Mrs. Clark, as administratrix of the Moffett Brothers estate in Kansas, did appear for and represent said estate in the partition-accounting suit, and claimant goes on to say in this "analysis" that Mrs. Clark, as administratrix of Moffett Brothers partnership estate in Kansas "paid thousands of dollars of Moffett Brothers partnership estate money out to attor-

neys, Martin J. O'Donnell and A. E. Watson, for helping her in" the partition-accounting suit. Which means, as we read, that attorneys O'Donnell and Watson, and not claimant, resisted the claim of the John Moffett estate against the Moffett Brothers estate in the partition-accounting suit."

Appellant and Mrs. Clark sought review of the partition-accounting suit by certiorari, in the Supreme Court of the United States, and claimant and other counsel resisted, and the writ was denied. (Clark, Admx., et al. *v.* Moffett et al., 290 U. S. 642, 54 Sup. Ct. 61, 78 L. Ed. 558.)

Appellant brought suit in the United States District Court (Kansas) to enjoin the enforcement of the judgment against the Moffett Brothers estate in the partition-accounting suit, but was unsuccessful. (Moffett *v.* Robbins, 14 Fed. Supp. 602, and 81 Fed. (2d) 431.) Notwithstanding that the purpose of the Federal court case was to enjoin the payment of a judgment against claimant's client, the Moffett Brothers estate, claimant said that he "was not directly interested in that case." And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a lawsuit on the same claim of indebtedness, as here, and claimant representing both of them. In a supplemental brief on behalf of the Commerce Trust Company, filed by attorneys, Hiller and Bush, it is stated that claimant "was allowed a fee (the $11,500, we infer), for acting as attorney for Commerce Trust Company, administrator of the Moffett Brothers copartnership estate in handling the complicated and difficult legal questions involved in procuring an accounting and adjustment of the partnership affairs, so proper distribution could be made."

(1) There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate

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in the partition-accounting suit, and the rule that counsel cannot lawfully represent conflicting interests in the courts of the land is as old as our system of jurisprudence. "This court has ever recognized and enforced the rule that it is the duty of an attorney to devote his skill and diligence to the interest of his client and has refused to permit him to act for the adverse party in the same suit, even though his motives were honest." (National Hollow Brake Beam Company *v.* Bakewell et al., 224 Mo. 203, l. c. 226, 123 S. W. 561.)

In MacDonald *v.* Wagner, 5 Mo. App. 56, l. c. 58, the court said: "An attorney cannot recover for legal services rendered by him both to plaintiff and defendant in the same suit. The plaintiff here discloses a case founded upon a cause of action which the law, from wise motives of public policy, forbids. The intentions of plaintiff were doubtless good; but a lawyer can under no conceivable circumstances recover for services rendered in the same suit to parties having opposing interests."

"Justice and ethics both require that no attorney be permitted to receive fees from adversaries in any cause." (Logan *v.* Logan et al., 97 Ind. App. 209, 180 N. E. 32, l. c. 34.) And, as stated in Sun Bldg. & Loan Assn. *v.* Rashkes, 119 N. J. Eq. 443, 183 Atl. 274, l. c. 277, "an attorney cannot act on behalf of two opposing parties; and even though he may act for two parties in matters which are uncontested, his conduct is open to the most careful scrutiny. He is obliged to exhibit the most perfect good faith. He cannot prejudice one client for the benefit of another. A scriptural passage which succinctly expresses the principle under consideration is found in Matt. VI, 24:33, as follows: 'No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other.'"

In Strong *v.* International Building, Loan & Investment Union et al., 183 Ill. 97, l. c. 101, 55 N. E. 675, is this: "Attorneys at law cannot thus accept employment from adverse litigants at the same time and in the same controversy. Nor does it matter that the intention and motives of the lawyers are honest, as we fully believe them to have been in the present instance. The rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent

conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent."

(2) The record shows that claimant has received $6000 as counsel for the Commerce Trust Company as executor *de bonis non* of the John Moffett estate, and the inference is that the greater part of the $6000 fee from the John Moffett estate was for services in the partition-accounting suit and related matters.

As we have stated above, there can be no question as to the conflict of interest, in the partition-accounting suit, between the John Moffett estate and the Moffett Brothers estate, and the rule, as we have seen, is that an attorney cannot receive pay from both sides where the respective interests are conflicting. (See also Rochester et al. *v.* Canterman et al. (Mo.), 49 S. W. (2d) 71; 7 C. J. S., sec. 167, p. 1024; 6 C. J., sec. 289, p. 722; 5 Am. Jur., sec. 64, p. 296; 2 R. C. L., secs. 51, 52, pp. 973, 974.)

Perhaps claimant rendered services for the Moffett Brothers estate of the value of $1300 when he was not representing conflicting interests That is not made clear, hence in the situation, we do not think that we should disturb the approval of the payment of the $1300.

The judgment should be reversed, and the cause remanded with directions to enter a judgment denying claimant any additional fee, but approving the payment of the $1300, and it is so ordered. Hyde and Dalton, CC., concur.

Per CURIAM: The foregoing opinion by Bradley, C., is adopted as the opinion of the court. All the judges concur.